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ALEXANDER L. STEVAS,
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JACQUES S. ZINMAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Donald J. Goldberg
Attorney for Petitioner

1310 Three Girard Plaza
Philadelphia, Pa. 19102
(215) 563-6345

QUESTION PRESENTED

1. Where the United States Attorney has agreed as part of a formal plea agreement to the precise words he will use in his sentence recommendation, may he in addition submit a letter from another branch of government which makes a sentence recommendation by using operative words different from the promised language — words which might be interpreted as calling for a harsher sentence?

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OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A hereto at Page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1983 (A-1). A timely Petition for Rehearing was denied on August 1, 1983 (A-3). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This petition raises a fundamental and recurring issue in the administration of criminal justice. Federal prosecutors are — with increasing frequency — straying from their plea agreement promises at the point of sentencing. The issue — presented in crystallized fashion in this case — is: Whether the United States Attorney, having agreed as part of a plea agreement to the precise words he will use in his sentence recommendation, may in addition submit a letter from another branch of government which makes a sentence recommendation by using operative words different from the promised language — words which might be interpreted as calling for a harsher sentence?

Jacques S. Zinman, petitioner herein, pleaded guilty in the United States District Court for the Eastern District of Pennsylvania to a seven count information charging him with federal tax crimes. He was sentenced to imprisonment and fined, and appealed to the United States Court of Appeals for the Third Circuit, but that court affirmed his conviction. This petition followed.

The guilty plea in this case was pursuant to a nine page formal plea agreement executed by the accused and all counsel. Paragraph five of the plea agreement provided that at the time of sentencing, the government was to recommend "an appropriate period of incarceration." As agreed, the government made its sentence recommendation using the precise words promised. In addition thereto, however, the prosecutor sent to the sentencing judge a letter from the district director of the Internal Revenue Service to the United States Attorney expressing his concern with the "flagrancy of the violations" committed by the accused and asking the United States Attorney to "seek a firm sentence to include, if you deem it appropriate, incarceration."

When this letter was sent, the prosecutor — and the IRS as well — knew that the prosecution deemed incar-

ceration appropriate and that the prosecution had bound itself by the plea agreement to recommend simply "an appropriate period of incarceration," so that submission of the IRS letter really amounted to a new and different recommendation, a recommendation for a "firm" sentence of incarceration. To further emphasize this harsher request, the prosecutor summarized the contents of the letter at sentencing and read, almost verbatim, the district director's recommendation.

REASONS FOR GRANTING THE WRIT

Whenever a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, the promise must be fulfilled and when the agreement includes a sentence recommendation, the defendant is entitled to the recommendation he bargained for. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971). The decision of the federal court of appeals in this case is in conflict with *Santobello*.

Here there can be no quibble over the fact that the IRS recommendation, adopted by the prosecutor, seriously magnified the jeopardy of the defendant at the bar. Indeed, that was its very purpose. A simple comparison of the standard dictionary definitions of the two key adjectives illustrates the extent to which the government failed to keep its word. Webster's New International Dictionary (3rd ed. 1969) defines "appropriate" as "specially suitable," whereas "firm" is defined as meaning "making no concessions, showing no weakness, unyielding, rigorous, inflexible, severe, hard." Also, a recommendation of an "appropriate" sentence of imprisonment calls for the court to fix a suitable term; a recommendation of a "firm" sentence of imprisonment urges the court to impose what the government believes to be suitable.

Thus, on its face, the district director's singular letter recommendation expressing concern with the "flagrancy of the violations" committed by the accused and urging the United States Attorney to "seek a firm sentence to include, if you deem it appropriate, incarceration" goes too far. But, in the context of this case, that recommendation differed more substantially from the promised language of the plea agreement earlier executed than might otherwise appear for when written, everyone connected with the case — including the Internal Revenue Service — already knew that the United States Attorney "deemed it appropriate" to seek incarceration, so that that part of the district director's letter re-

quest was obvious surplusage.¹ The real purpose of the letter can only have been to put the offense and the offenders in the worst possible light and to urge a "firm sentence" *in addition to incarceration*. But, whether so designed or not, that was its inescapable effect when the prosecutor who was already asking for incarceration added the IRS letter recommendation to his own by submitting the letter to the sentencing judge and emphasizing its demand for a "firm sentence" during the sentencing hearing. By so doing, the government effectively asked for more of a sentence than it was entitled to recommend.

The government's breach is, of course, the same even if the IRS letter is viewed as calling for no more severe of a sentence than the government had agreed to recommend. The government's duty of strict adherence to the bargain it makes in return for a guilty plea is nowhere more critical than in the words it has promised to use in its sentence recommendation. Simply put, a prosecutor's recommendation must contain what he promised to say — neither more nor less — and not what is arguably equivalent or better. *Plea agreements are supposed to resolve litigation, not create it.* Having bargained for the precise words used by the government in making its sentence recommendation, a defendant who offers his plea in exchange for those words is entitled to have the prosecutor's statements match his promise, not what may reasonably be as good.

Hard bargaining is a part of every day's work in the criminal courts, mostly over what the prosecutor will recommend in the event of a guilty plea. There are as many different ways of wording a recommendation as there are words to use. When a defendant offers his plea not in exchange for the actual sentence, but for the pros-

1. The formal plea agreement expressing the government's intention to ask for appropriate incarceration was filed of record and read verbatim in open court on September 13, 1982. The IRS letter was dated November 3, 1982.

ecutor's statements at sentencing, the plea agreement is breached whenever the operative words of the sentence recommendation differ, no matter how narrowly, from the promised language.

Nor does it matter that the breach came by way of a letter from the district director of Internal Revenue. The Internal Revenue Service is as much a part of the government as is the United States Attorney. Moreover, the letter was submitted to the sentencing judge by the prosecution and was read from by the prosecutor during the sentencing hearing.

This case presents a perfect record for this Court to amplify its decision in *Santobello*, *supra*, so as to make plain what is required of a prosecutor who has secured a guilty plea in return for a promise to use particular words in making the government's sentence recommendation. Plea bargaining has become too important to the administration of criminal justice for there to remain any question as to what is required on each side of the bargain.

CONCLUSION

For the reasons stated above, this case is ideally suited for plenary review by this Court.

Respectfully submitted,

Donald J. Goldberg
Attorney for Petitioner

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1742

UNITED STATES OF AMERICA

v.

ZINMAN, JACQUES S.,

Appellant

Appeal from the United States District Court for the
Eastern District of Pennsylvania (D.C. Criminal No.
82-00273-01)

Argued June 13, 1983

Before: HUNTER and HIGGINBOTHAM, *Circuit Judges*,
and ZIEGLER,* *District Judge*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred:

1. in not finding that the government breached its plea agreement by submitting a letter from the

*Honorable Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Internal Revenue Service seeking a firm sentence where the government agreed to recommend at sentencing only appropriate incarceration,

2. by acting on the basis of material misinformation supplied by the government and not vacating and remanding the case for resentencing,

3. by not vacating the sentence on count I of the Information because that count is insufficient in law in that the conspiracy to defraud there charged under 18 U.S.C. §371, which proscribes in general terms conspiracies to defraud the United States, has been superseded with respect to conspiracies to defraud involving violations of the Internal Revenue laws by the provisions of the Internal Revenue Code.

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

JAMES HUNTER, III,
Circuit Judge

ATTEST:

Chief Deputy Clerk

Dated: July 5, 1983

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APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 82-1742

UNITED STATES OF AMERICA

v.

ZINMAN, JACQUES S.,

Appellant

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Chief Judge*, ALDISERT, ADAMS,
GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER,
Circuit Judges

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active ser-

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vice not having voted for rehearing by the court in banc,
the petition for rehearing is denied.

By the Court,

Judge

Dated: August 1, 1983

*Honorable Donald E. Ziegler, United States District Judge for the
Western District of Pennsylvania, sitting by designation